Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554



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| In the Matter of | ) | |
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| Accounting For Judgments And Other Costs Associated With Litigation | ) | CC Docket No. 93-240 |
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# COMMENTS OF THE NYNEX TELEPHONE COMPANIES

NEW YORK TELEPHONE COMPANY

and

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY

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Dated: October 15, 1993

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## I. INTRODUCTION

New England Telephone and Telegraph Company and New York Telephone Company (the NYNEX Telephone Companies or NYNEX) submit these Comments in response to the Commission's Notice of Proposed Rulemaking (NPRM) released September 9, 1993 in the above-captioned matter. The NPRM proposes accounting rules and interstate ratemaking policies regarding certain litigation, settlement and judgment costs of carriers. The Commission had previously established rules and policies in this area in the Litigation Costs Proceeding.[1] The D.C. Circuit vacated those rules and policies and remanded the matter to the FCC.[2] The Court found the FCC did not adequately justify the scope of the rules and policies; and that the FCC did not sufficiently consider their probable effect upon the carriers'

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1 CC Docket No. 85-64, cited in NPRM n. 1.

2 Mountain States Telephone and Telegraph Co. v. FCC, 939 F.2d 1035 (D.C. Cir. 1991) (Litigation Costs Decision).

3 Id. at 1037.

incentives.[3] In a closely related and simultaneous case, the D.C. Circuit vacated the FCC's decision to require below-the-line accounting for carriers' litigation expenses incurred in defending the Litton antitrust lawsuit.[4]

This NPRM represents the FCC's effort on remand to develop rules and policies responsive to the D.C. Circuit's directives. The FCC seeks comment on:

- the need for litigation costs rules, in light of the fact that accounting and ratemaking presumptions do not affect rates under the price cap formula (NPRM para. 7);
- specific proposals regarding accounting and ratemaking for litigation, settlement and judgment costs in federal antitrust lawsuits (NPRM paras. 9-19);
- whether litigation costs rules should be extended to state antitrust lawsuits (NPRM para. 21);
- whether litigation costs rules should be extended to lawsuits involving alleged violations of other federal statutes (NPRM paras. 22-25);
- whether the Litton Accounting Appeal should influence future treatment of litigation expenses (NPRM paras. 26-29).

## II. SUMMARY AND NYNEX POSITION

FCC price cap regulation has severed the direct link between costs and rates. This regime together with increasing competition has limited carriers' ability to recover costs in rates, which in turn has lessened the need for litigation costs rules. Limited Commission resources should not be deployed in

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4 Mountain States Telephone and Telegraph Co. v. FCC, 939 F.2d 1021 (D.C. Cir. 1991) (Litton Accounting Appeal) (cited in NPRM para. 4).

promulgating and administering detailed requirements in this area that are burdensome and do not yield commensurate ratepayer benefits.

In developing any litigation costs rules in this remand proceeding, the Commission should be responsive to both D.C. Circuit decisions (i.e., the Litigation Costs Decision and the Litton Accounting Appeal), and not simply rely on the former but ignore the latter. While the Commission has recognized conflict between the two decisions, the Commission should strive to minimize conflict and achieve a balanced result. The key principles of those two decisions are as follows. The Litigation Costs Decision basically teaches that certain costs resulting from federal antitrust violations can reasonably be presumed not to benefit ratepayers. The Litton Accounting Appeal essentially teaches that for antitrust litigation expenses, it will be very difficult if not impossible to justify other than above-the-line accounting as the expenses are incurred. Such litigation is an inevitable fact of business life. The plain reality is that carriers are perceived as "deep pockets" and are very attractive targets for litigation that must be defended. Until specifically challenged, litigation expenses (like most costs generally) should be presumed to be reasonable and prudently incurred, and therefore accounted for above-the-line.

The Commission should ensure that its rules and policies: reasonably and fairly balance the interests of both carriers and ratepayers; give cognizance to the time-tested standard of assessing the reasonableness of costs at the time

they are incurred; and foster incentives consistent with the above principles.

In this framework, NYNEX takes the following positions and supports them herein:

- Adverse antitrust judgments should be recorded below-the-line.
- Pre-judgment settlements should be recorded above-the-line.
- Settlements following adverse antitrust judgments should be accounted for below-the-line. (As a ratemaking matter, however, carriers should be permitted to presumptively include in revenue requirements the "nuisance value" of the case.)
- Litigation expenses should be recorded above-the-line as incurred.
- The litigation costs rules need not and should not be extended to state antitrust lawsuits nor to lawsuits involving allegations of violations of federal statutes other than antitrust.
- Subject to existing rules and procedures, the FCC can properly continue to specifically evaluate under the "just and reasonable" standard any litigation costs (initially recorded above-the-line), and to exclude those costs from rates in particular cases.

## III. BACKGROUND

### A. The FCC's Prior Litigation Costs Rules

The FCC previously required that, in connection with cases in which a violation of U.S. statute is alleged, upon adverse final judgment/verdict or settlement following adverse summary judgment ruling terminating the action, the telephone companies must exclude any litigation costs previously booked above-the-line from revenue requirements in the next appropriate interstate rate proceeding. Prior to such "recapture," litigation costs are to be booked above-the-line

as incurred. The actual adverse final judgment or settlement amount is to be booked in below-the-line Account 7370 and will presumptively be disallowed. Carriers are free in rate proceedings to make arguments in an attempt to recover otherwise presumptively disallowed litigation, settlement or judgment cost amounts. Finally, in case of settlement before judgment, the carrier can presumptively recover the amount of the settlement corresponding to the present value of saved interstate litigation costs that are substantiated, i.e., the "nuisance value" of the suit.[5]

B. The Litigation Costs Decision

In vacating the FCC's prior rules and policies, the D.C. Circuit[6] observed in the antitrust context that:

> The Commission acted quite reasonably ... in aligning the presumption (against recovery) with the majority of antitrust cases, in which consumers do not benefit from the conduct occasioning liability.[7]

The Court found the FCC did not reconcile its litigation expense rules/policies with the rule against retroactive ratemaking.[8] Also, the Court concluded that the Commission did not adequately support the extension of its litigation costs rules to all federal statutory cases.[9] Providing an

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5 See NPRM paras. 2-4.

6 The panel consisted of Judges Edwards, D.H. Ginsburg and Sentelle.

7 939 F.2d at 1043.

8 Id. at 1044.

9 Id. at 1042-43, 1044-46.

illustration, the D.C. Circuit pointed out that carrier activity giving rise to liability could, at the time undertaken, reasonably be expected to produce a net benefit for ratepayers.[10] Regarding carriers' incentives to settle or litigate, the Court indicated that, among other things, since the economics of pre-judgment and post-judgment settlements are identical, the FCC did not justify its refusal to extend the "nuisance value" recovery policy to post-judgment settlements.[11]

C. The Litton Accounting Appeal

The same day the Litigation Costs Decision was issued, the D.C. Circuit issued its decision in the Litton Accounting Appeal.[12] The Court vacated and remanded FCC orders that required carriers to record below-the-line the litigation expenses incurred in defending the Litton antitrust lawsuit which resulted in an adverse judgment. The Court relied upon and emphasized the well-established legal requirement that prudently incurred costs shall be allowed in ratemaking.[13] The Court stated:

> Illegality of carrier conduct from which an antitrust litigation expense stems does not inexorably compel or warrant either rejection or stigmatization of the expense as a factor in rate calculations.... [A] pervasive element in ratemaking is reasonableness,

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10 Id. at 1044-45.

11 Id. at 1047.

12 The panel in the Litton Accounting Appeal consisted of Judges Starr, Buckley and Robinson.

13 939 F.2d at 1029, 1034.

> which demands inquiry beyond the bare fact of antitrust violation.[14]

The D.C. Circuit also found that the FCC's success/failure standard for allowability of litigation expenses was too narrow and unsound.[15] Further, the Court concluded that the Commission did not provide a rational policy basis for its rules that would properly balance utility and consumer interests.[16] Among other things, the Court questioned how regulated entities could abide by the rules and still operate efficiently given that lawsuits are a fact of life and involve complex, uncertain issues.[17]

## IV. NYNEX RESPONSES TO FCC'S SPECIFIC PROPOSALS

### A. Antitrust Judgments

#### 1. FCC Proposal

Carriers shall record antitrust judgments below-the-line (NPRM para. 10).

#### 2. NYNEX Response

We concur with the FCC's proposal. Since the costs result from an antitrust violation as finally determined by the court, those costs can reasonably be presumed not to benefit ratepayers.[18]

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14 Id. at 1031. The Court cited for additional support certain analogous Supreme Court decisions in the context of taxation. Id. at 1031-32.

15 Id. at 1032-33.

16 Id. at 1033-35.

17 Id. at 1034.

18 See Litigation Costs Decision, 939 F.2d at 1043.

B. Antitrust Settlements

1. FCC Proposal

Carriers shall record antitrust settlements below-the-line. If the settlement is reached prior to judgment, the carrier can presumptively include in revenue requirements the saved litigation costs (i.e., "nuisance value" of the lawsuit) (NPRM paras. 11-12).

2. NYNEX Response

a) Pre-Judgment Settlements: These should be recorded above-the-line. Antitrust litigation is part of the ordinary course of business. The court has not found any antitrust violation, and the settlement is not an admission of unlawful conduct but is merely an economic decision. Accordingly, the pre-judgment settlement costs should be presumed reasonable. The Litton Accounting Appeal supports this approach since, just like the litigation expenses, the key issue should be reasonableness and prudency of the costs as incurred.

We acknowledge that the Litigation Costs Decision observed that allowing antitrust settlements to be recorded above-the-line would create an incentive for carriers to settle such suits even if the settlement exceeds the expected liability.[19] However, the FCC should give precedence to the longstanding reasonableness presumption and allow pre-judgment settlements to be booked above-the-line as incurred. The FCC can always disallow such settlement costs in ratemaking if there is evidence of improper incentives being acted upon. For

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19 939 F.2d at 1046, cited in NPRM para. 11.

example, a disallowance could be in order if a carrier agreed to a settlement that is judged excessive when compared to the probability of a violation being found and the expected litigation expenses and judgment.

Furthermore, as the FCC states (NPRM para. 7):

> Presumptions regarding the inclusion or exclusion of expenses in a carrier's "revenue requirement" do not affect the development of rates under our price cap formula.

The Commission also notes that price cap LECs must share with ratepayers a portion of interstate earnings above a certain level (id.). However, it would be unreasonable for a carrier to incur additional settlement costs in order to reduce the amount of earnings shared, because that would in effect take earnings away from (and be a net loss to) the shareholders. Also, in the present environment of intensifying competition, marketplace forces provide a disincentive for such unnecessary costs to be borne.

b) Post-Judgment Settlements: Here a court has found an antitrust violation, but the case is still appealable. We acknowledge that if such settlements could be booked above-the-line, carriers would have an incentive to settle after adverse judgment rather than appeal. Accordingly, the FCC could strike the appropriate balance by mandating below-the-line accounting treatment. (Of course, the presumption of unreasonableness might be overcome by particularized showings in the ratemaking context.)

The FCC should permit carriers to presumptively include in revenue requirements the portion of the post-judgment settlement that represents saved litigation

expenses (i.e., nuisance value). As the Commission recognizes in the NPRM (para. 13):

> In the Litigation Costs Decision, the court accepted the concept of a nuisance value exception to the presumption against recovery of settlements, but found that the Commission had not adequately considered the incentive effects of the pre-judgment/post-judgment distinction:
>
> "[T]he economics of the two are identical. As the agency recognized in the pre-judgment context, if the carrier cannot recover what it pays out in a settlement then it has an incentive to continue litigation - in the post-judgment context, to pursue an appeal - even if the cost of doing so exceeds the amount for which it could settle the case/n. 24: Litigation Costs Decision, 939 F.2d at 1047."

The Commission acknowledges this incentive but states that ratepayers will be harmed only when the carrier wins the appeal.[20] The FCC has not fully responded to the Court's concerns, however. First, the Commission has not addressed the carriers' interests. Carriers will be harmed from the undue incentive to litigate (and ultimately lose) some cases rather than incur settlement costs which are reasonable but would be totally disallowed in rates. Second, the Commission's discussion just notes the incentive to litigate and the possible results (as already noted by the Court) and states conclusorily that, on balance, the Commission's proposal is not

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20 NPRM paras. 14-15.

unduly harmful to ratepayers. This analysis by the FCC does not adequately address the Court's concerns.[21]

C. Other Antitrust Litigation Expenses

1. FCC Proposal

Other antitrust litigation expenses should be accrued in a balance sheet deferral account. In case of a pre-judgment settlement, the expenses would be recorded above-the-line. Upon entry of an adverse nonappealable final judgment or post-judgment settlement, those expenses would be charged below-the-line. If the carrier wins, the expenses would be amortized above-the-line for a reasonable period (NPRM paras. 17, 19).

2. NYNEX Response

The Commission acknowledges that:

> The Litton Accounting Appeal opinion leans heavily towards considering litigation expenses to be allowable even in the event of an adverse antitrust judgment.... We acknowledge that parts of the Litton Accounting Appeal opinion are not favorable to our proposals.[22]

However, the Commission inappropriately chooses to disregard the Litton Accounting Appeal and to rely solely on the

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21 In any case, we note that it is a significant effort for carriers to prepare a demonstration of saved litigation expenses, and that the FCC closely scrutinizes such showings; these factors provide a disincentive to pursue this course especially if the dollar amounts are not substantial.

22 NPRM paras. 27, 29.

Litigation Costs Decision.[23] Here again, NYNEX recommends that the Commission implement the D.C. Circuit's guidance from the Litton Accounting Appeal in order to achieve a balanced result. In short, the FCC should continue to permit above-the-line accounting for litigation expenses as incurred, subject to ratemaking disallowance in a particular case.

The proper standard for ratemaking treatment of expenses, including litigation expenses, is reasonableness. Incurred expenses are presumed reasonable unless facts are produced showing wastefulness, imprudence or an abuse of management discretion. Disallowances can only be made based on facts of record. Disallowances unsupported by record evidence would be unlawful.

Litigation involves a number of complex evaluations of facts and risks which management properly makes. Broad disallowances of carrier litigation expenses would encourage unmeritorious litigation against carriers while discouraging carriers from defending against such claims and from asserting and litigating meritorious claims. The adverse impact on the carriers' ability to serve would be contrary to both carrier and ratepayer interests.

The D.C. Circuit in the Litton Accounting Appeal indicated that Supreme Court precedent supports an initial presumption that litigation expenses are reasonable:

> More than a half-century ago, the Supreme Court admonished regulatory agencies to "give heed to all legitimate expenses that will be charges upon income during the term of regulation." We ourselves have

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23 Id. at para. 29.

> observed that "[i]f [expenses are] properly incurred, they must be allowed as part of the composition of the rates. Otherwise, the so-called allowance of a return upon the investment, being an amount over and above expenses, would be a farce." The Commission is in accord.... It has long been the conventional rule that utility expenses prudently incurred are allowable in ratemaking. "Good faith is to be presumed on the part of the managers of a business," the Supreme Court has declared, and "[i]n the absence of a showing of inefficiency or improvidence, a court will not substitute its judgment for theirs as to the measure of a prudent outlay." We agree that "lawsuits are a recurring fact of life in operating a business" - and in that even the Commission concurs - and litigation strategies undoubtedly are a recurring if indeed not a constant business challenge. Antitrust suits frequently present a multitude of complex issues, many of which may be intertwined with esoteric economic concepts in a legal context where precedents and clear standards may be hard to come by. Serious strategy planning may at best be difficult, and under the Commission's regimen may be well-nigh impossible. Planning for any given antitrust case must be done in total ignorance of the factor the Commission deems critical - the final outcome of the case - and in the ominous shadow of the looming adverse presumption.... We believe the tension between longstanding judicial and newly devised administrative procedures could hardly be more severe.[24]

The Litigation Costs Decision should not be read to override these principles. Again, the central ruling of the Litigation Costs Decision was that certain antitrust litigation costs may be presumed unreasonable where they are "incurred as a result of the carrier's illegal activity."[25] But this principle does not apply to litigation expenses as incurred because no illegality has been determined at that point. The expenses are simply caused by the carrier's reasonable need to defend itself in the ordinary course of business. Absent

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24 939 F.2d at 1029, 1034 (footnotes omitted).

25 939 F.2d at 1043.

specific challenge and evidence, those litigation expenses cannot properly be presumed unreasonable or held in limbo at that point.

The Litton Accounting Appeal made clear that a success/failure standard for allowability of litigation expenses is simplistic and indefensible:

> [A] pervasive element in ratemaking is reasonableness, which demands inquiry beyond the bare fact of antitrust violation....
>
> The action of the Commission under scrutiny encounters yet another difficulty. By the Commission's formula, only if the carrier loses in the antitrust suit are the expenses thereof moved below the line, and only then does the presumption against their consideration in ratemaking come into play. Success or failure in the antitrust litigation thus becomes the sole determinant of these consequences, and this success-failure standard has met disfavor in parallel contexts....
>
> We thus are not persuaded that the Commission's legal rationale for its broad position finds a safe haven in the caselaw. The Commission makes clear that an adjudicated antitrust violation, standing alone, will invariably trigger its accounting directive and the accompanying presumption, but pertinent decisions convince us that logic and reasonableness require a wider and more discriminating focus.[26]

In all events, the FCC's proposal that carriers record antitrust litigation expenses in a deferred expense balance sheet account (Account 1439)[27] is unsound. This treatment is not consistent with generally accepted accounting principles (GAAP). At a time when the FCC continues to move toward conformity with GAAP in its rules, the proposed deferred expense accounting treatment would be a step backward.

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26 939 F.2d at 1031-33.

27 NPRM para. 17.

First, the Financial Accounting Standards Board (FASB) Statement of Concepts No. 6, "Elements of Financial Statements," provides that accrual accounting should be used in preparing financial statements. The purpose of accrual accounting is to record the financial impact of a transaction in the periods in which those transactions occur rather than when cash is received or paid, to the extent that those financial effects are recognizable and measurable. This usually results in the recognition of expense and a liability.

Second, Statement of Financial Accounting Standards (SFAS) No. 5, "Accounting for Contingencies," states that an estimated loss should be accrued and charged to income and a liability should be recorded if: (1) information available prior to issuance of the financial statements indicates that it is probable that an asset has been impaired or a liability has been incurred at the date of the financial statements and (2) the amount can be reasonably estimated.

Under these FASB pronouncements, litigation expenses should be accounted for as an expense with a corresponding accrued liability as incurred since those expenses represent actual, measurable outlays.

Third, the intensified competitive environment has significantly weakened the regulators' ability to assure future recovery of costs. Without this assurance, deferral of costs would be contrary to GAAP as provided in SFAS No. 71, "Accounting For The Effects Of Certain Types Of Regulation." SFAS No. 71 allows cost deferral only as long as there is a reasonable regulatory promise of recovery of such costs.

Fourth, the FCC's proposed deferral accounting, which would hold significant expenses in suspense for long periods, would distort financial results over time. This would inject undue uncertainty and inaccuracy in regulatory accounting.

Fifth, the Commission's proposal is improperly asymmetrical. If the carrier receives an adverse judgment, the litigation expenses are charged below-the-line in a one-time lump sum. However, if the carrier prevails in the lawsuit, "the expenses would be amortized above-the-line for a reasonable period."[28] Balanced treatment of carriers and ratepayers must be afforded in this case.

Finally, the FCC previously rejected as "counterproductive" a very similar "proposal that litigation expenses be recorded in a balance sheet deferral account until the decision becomes final."[29] The Commission emphasized that a "major problem" with the deferral approach would be the uncertain treatment over lengthy time periods of costs which may be prudently incurred. The Commission also observed that "[t]his [deferral] approach ... is inconsistent with our recognition that incurrence of litigation expenses is not unusual."[30] These reasons given by the FCC for rejecting deferred treatment of litigation expenses are just as forceful today.

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28 NPRM para. 17.

29 Accounting For Judgements And Other Costs Associated With Antitrust Litigation, CC Docket No. 85-64, Report and Order released May 15, 1987, 2 FCC Rcd 3241, paras. 34-36.

30 Id. at para. 35.

D. Litigation Other Than Federal Antitrust

1. FCC Proposal

The litigation costs rules should apply to state as well as federal antitrust lawsuits (NPRM para. 21).

The litigation costs rules should apply "beyond the antitrust context to lawsuits involving violation of federal statutes in which the actions giving rise to the suit did not benefit ratepayers" (para. 22). Two options are offered for implementation:

- The FCC would review on a case-by-case basis the above ratepayer benefit issue in lawsuits involving a federal statutory claim in which a settlement or judgment exceeded some threshold amount, e.g., $5 million. For lawsuits subject to case-by-case review, the FCC is considering three possible approaches: 1) deferral accounting for litigation expenses; 2) deferral accounting once litigation expenses exceed a threshold level; 3) above-the-line accounting (NPRM para. 24).

- The second option would be for the Commission to adopt a list of other federal statutes for which it can reasonably be assumed that actions in violation of the statute did not benefit ratepayers. These cases would be treated the same as antitrust (NPRM para. 25).

2. NYNEX Response

The Commission should not extend litigation costs rules to state antitrust lawsuits because: there is no compelling record that a violation of various state antitrust statutes can be presumed to be harmful to ratepayers; these state antitrust statutes are numerous and vary; such requirement would result in burdensome litigation cost tracking requirements; and the extension of the rules outside the federal antitrust context would not be an efficient use of limited FCC resources. Moreover, the FCC's regulatory jurisdiction is federal, not state.

The Commission observes:

> We also tentatively conclude that the litigation costs rules should apply beyond the antitrust context to lawsuits involving violation of federal statutes in which the action giving rise to the suit did not benefit ratepayers. We limit our proposal to violations of statutes because expenses incurred in defense of common law actions have long been allowed for ratemaking purposes as expenses incurred as part of doing business. We believe that this approach is consistent with the ratepayer benefit standard because most common law actions against carriers arise out of events that occur in the normal course of providing service to ratepayers, and ratepayers benefit from provision of service.
>
> We propose to limit application to litigation costs incurred in the defense of claims of federal statutory violations because we believe that the diversity in state laws makes application of these rules to all state statutes impractical. Relatedly, we believe it to be an inefficient use of the Commission's scarce resources to review every lawsuit involving statutory claims.[31]

NYNEX thinks the Commission's reasoning regarding common law equally applies to the statutory context, and that the reasoning on state statutes equally applies to state antitrust. The requirement for carriers to defend themselves in the ordinary course of business, as well as FCC administrative economy, warrant not applying the proposed litigation costs rules outside the federal antitrust context.

The two options put forth by the FCC for implementation of any rules outside the federal antitrust arena[32] are unsound. Case-by-case review would be an administrative nightmare, and not an effective or efficient use

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31 NPRM paras. 22-23 (footnotes omitted).

32 NPRM paras. 24-25.

of Commission resources in a competitive environment where less, rather than more, regulation is needed.[33] The Commission's proposal on examining lists of particular federal statutes is particularly unwarranted and impractical. It would be quite an onerous and awkward exercise for the FCC to scrutinize legislative intent underlying myriad federal statutes and make judgments on whether violations will benefit or harm ratepayers.

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33 In any ad hoc review of cases, the Commission's third option (NPRM para. 24 -- calling for above-the-line accounting of litigation expenses) is clearly preferable.

## V. CONCLUSION

The Commission should equitably balance carrier and ratepayer interests, and implement applicable legal precedents, by presuming reasonableness in the first instance of litigation costs except for adverse federal antitrust judgments and post-judgment settlements.

Respectfully submitted,

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Dated: October 15, 1993

## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing COMMENTS OF THE NYNEX TELEPHONE COMPANIES in CC Docket No. 93-240 was served by hand on the organizations listed below on October 15, 1993.

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